Supreme Court, U. S.
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DEC 15 1980
MICHAEL RODAK, JR., CL

80-963

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

v.

JOHNNIE JOSEPH OLAH
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

EDWARD REILLY WILSON
Principal Attorney, Appeals

TIMOTHY A. BAUGHMAN
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

I
QUESTION PRESENTED

I.

UNDER BALDASAR v ILLINOIS, ___ US ___; 64 L Ed 2 d 169 (1920) MAY AN UNCOUNSELED MISDEMEANOR CONVICTION, ITSELF CONSTITUTIONAL UNDER SCOTT v ILLINOIS, 440 US 367 (1979) IN THAT NO TERM OF IMPRISONMENT WAS IMPOSED, BE USED TO FORM THE BASIS OF REVOCATION OF A PREVIOUSLY IMPOSED TERM OF PROBATION IN ANOTHER CASE?

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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

v

JOHNNIE JOSEPH OLAH
Respondent

Petition For A Writ Of Certiorari To
The Supreme Court Of The State Of Michigan

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan

NOW COMES William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward Reilly Wilson, Principal Attorney, Appeals, and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan, entered in the above-entitled cause on November 21, 1980.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported at 90 Mich App 402; 282 NW 2d 335 (1979), and is appended as Appendix A. The order of the Michigan Supreme Court is not yet reported, and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 23, 1979. The judgment of the Michigan Supreme Court was entered on November 21, 1980. The jurisdiction of this Court is invoked under 28 USC sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In December of 1974 respondent was found guilty of felonious assault and sentenced to two years probation, the first six months to be spent in the Detroit House of Correction. A condition of probation was that he not violate any criminal laws or ordinances.

On December 18, 1975 respondent was convicted, without counsel, of a controlled substances misdemeanor, and on July 27, 1976, a marijuana ordinance violation. He paid fines on both cases and was not incarcerated. On October 29, 1976, a petition was filed charging respondent with violating the terms of his probation, alleging, among other things, the above-mentioned convictions. Probation was revoked at a hearing wherein respondent had counsel.

The Michigan Court of Appeals affirmed, relying on Scott v Illinois, 440 US 367 (1979), and observing:

> . . . revocation was by no means the inevitable result of the misdemeanor convictions. Defendant's probation was revoked only after a hearing at which he was afforded the opportunity to present evidence in his defense or in mitigation of the apparent violation of which he was accused. Defendant was afforded assistance of counsel at this hearing, as well as at his trial on the original felony charge. At every stage of the proceedings at which he could have suffered the penalty of imprisonment, therefore, defendant had his constitutional right to counsel. 90 Mich App at 406-407.

The Michigan Supreme Court reversed relying on the intervening decision of Baldasar v Illinois, ___ US ___; 64 L Ed 2d 169 (1980): "Violation of probation which results in a prison sentence is an increase as to an original sentencing decision which is precluded by Baldasar v Illinois if counsel did not assist the defendant at the interim prosecutions."

REASONS FOR GRANTING THE WRIT

Baldasar v Illinois, ___ US ___; 64 L Ed 2d 169 (1980) is a confusing case. It appears that once Baldasar was charged under Illinois law as a second offender and convicted (his first conviction being counselless but constitutional under Scott v Illinois, 440 US 367 (1979)) the trial judge had no option but to sentence him as a felon. Justices Stewart, Brennan and Stevens joined in stating that reversal was required because Baldasar "was sentenced to an increased term of imprisonment only because he had been convicted in a previous prosecution in which he had not had the assistance of appointed counsel in his defense." (emphasis in original) 64 L Ed 2 d at 173. Justices Marshall, Brennan and Stevens observed that "Solely because of the previous conviction the second offense was transformed from a misdemeanor into a felony. . . ." 64 L Ed 2d at 174. Justice Blackmun held to his dissent in Scott. Justices Powell, White, Rehnquist, and the Chief Justice dissented, rejecting the view that sentence enhancement equals imprisonment for the earlier offense, and noting the constitutional validity of the first conviction.

The instant case does not fall within the rationale of the concurring opinions. Respondent's convictions did not automatically trigger revocation of his probation; rather, as the trial judge stated, they constituted a prima facie showing that respondent had "violated a criminal law or ordinance." Respondent was free to allege that despite the convictions he had not in fact violated any law. He did not do so. In Baldasar for defendant to have disputed his factual guilt of the counselless conviction would have been irrelevant at the second trial. Not so here, at a hearing at which respondent was supplied counsel. The Michigan Supreme Court has misconstrued Baldasar. The Michigan Court of Appeals was correct.

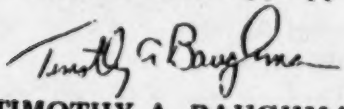
RELIEF

Wherefore, Petitioner requests that plenary review be granted.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
County of Wayne
State of Michigan

EDWARD REILLY WILSON
Principal Attorney, Appeals



TIMOTHY A. BAUGHMAN
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5794

TAB:plw

Dated: December 1, 1980

APPENDIX "A"

PEOPLE v OLAH

Docket No. 77-1723. Submitted March 6, 1979, at Detroit. — Decided May 23, 1979.

Johnnie J. Olah was convicted of felonious assault and was placed on probation. He was subsequently convicted of two misdemeanors, and it was alleged that he had failed to pay costs and restitution as required in the order of probation. A probation revocation hearing was held at which defendant was represented by counsel. He was found guilty of probation violation. As a consequence, his probation was revoked and he was sentenced to prison, Wayne Circuit Court, William J. Giovan, J. Defendant appeals, alleging that the trial court erred in considering the misdemeanor convictions because the convictions were invalid as he was indigent and was not offered the assistance of counsel at any of the proceedings in connection with the misdemeanor convictions. Held:

The misdemeanor convictions are not invalid. In each case the defendant paid a fine and served no time in jail or in prison. The Constitution requires only that an indigent may not be sentenced to prison unless afforded the right to appointed counsel. The fact that the defendant was not offered the assistance of counsel in the proceedings on the misdemeanors does not invalidate the misdemeanor convictions because a term of imprisonment was not the inevitable result of those convictions.

Affirmed.

Criminal Law — Constitutional Law — Assistance of Counsel — Imprisonment — Misdemeanors.

Appendix "A"

An indigent criminal defendant who has not been afforded the right to assistance of appointed counsel may not be sentenced to a term of imprisonment; a conviction for a misdemeanor for which a defendant paid a fine and did not serve time in jail or in prison is not rendered constitutionally infirm by the fact that the defendant, allegedly an indigent, was not offered the assiistance of counsel (US Const, Ams VI, XIV).

Rold E. Berg, Assistant State Appellate Defender, for defendant on appeal.

Before: N. J. Kaufman, P.J., and T. M. Burns and R. M. Maher, JJ.

Per Curiam. Defendant appeals as of right from an order of the Wayne County Circuit Court, dated January 24, 1977, revoking his probation and sentencing defendant to a term in prison of from 16 months to 4 years with credit given for 257 days spent in custody.

The basis for defendant's probation was a December 4, 1974 jury verdict finding him guilty of felonious assault contrary to MCL 750.82; MSA 28.277. Thereafter, on February 24, 1975, defendant was placed on 2 years probation.

The conditions of defendant's probation were that he spend the first 6 months of the probation period in the Detroit House of Correction, that he pay costs of $345 in equal monthly installments beginning 30 days after his release from confinement and that he make restitution in the amount of $182 within 6 months of his release. A further condition of probation was that defendant not violate any criminal laws or ordinances.

Defendant appealed his conviction for felonious assault and this Court affirmed, Docket No. 23601, December 5, 1975 [unreported].

Thereafter, on October 29, 1976, a petition was filed charging defendant with violation of the terms of his probation. Specifically, the petition alleged that defendant was convicted of two misdemeanors, the first being a December 18, 1975, conviction under the Controlled Substances Act in the 19th District Court and the second being a July 27, 1976, conviction for possession of marijuana under a Detroit city ordinance in the Recorder's Court, Traffic and Ordinance Division. The petition further alleged that defendant failed to pay court costs and restitution as required by the terms of probation. The trial court found defendant guilty of probation violation on all counts.

On appeal defendant asserts that the trial court erred in considering his misdemeanor convictions. He maintains, citing Argersinger v Hamlin, 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972), that these convictions were constitutionally infirm in that he was indigent, was not offered the assistance of counsel and did not waive counsel at any stage of the proceedings connected with his misdemeanor convictions. Defendant argues persuasively that constitutionally infirm convictions may not serve as a basis for revoking probation, analogizing to the sentence enhancement and impeachment cases. See People v Moore, 391 Mich 426; 216 NW2d 770 (1974). The argument fails, however, because defendant's convictions are not constitutionally infirm.

We note that on each occasion defendant paid the assessed fine and did not serve time in jail or in prison. In Scott v Illinois, ___ US ___; 99 S Ct 1158, 1162; 59 L Ed 2d 383, 389 (1979), the United States Supreme Court clarified its decision in Argersinger, supra, saying:

> "Although the intentions of the Argersinger Court are not unmistakably clear from its opinion, we conclude today that Argersinger did indeed delimit the constitutional right to appointed

counsel in state criminal proceedings. Even were the matter res nova, we believe that the central premise of Argersinger — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. Argersinger has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial costs on 50 quite diverse States. We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." (Footnotes omitted.)

Thus, since defendant's convictions were not constitutionally infirm, his argument that the misdemeanor convictions could not be considered at his probation revocation proceeding must fail.

Defendant, however, advances the argument that he was sentenced to prison for probation violation as a result of the misdemeanor convictions, and that this renders these convictions infirm for lack of counsel. We disagree. Defendant was sentenced to a term of imprisonment, not for committing the misdemeanors, but for committing the felony of felonious assault, and thereafter violating the terms of his probation.[1] It is true that the misdemeanors were the cause of the revocation of defendant's probation, and the revocation of probation resulted in the sentence of imprisonment. However, revocation of defendant's probation was by no means the inevitable result of the misdemeanor convictions. Defendant's probation was revoked only after a hearing at which he was afforded the opportunity to present evidence in his defense or in

mitigation of the apparent violation of which he was accused. Defendant was afforded assistance of counsel at this hearing, as well as at his trial on the original felony charge. At every stage of the proceedings at which he could have suffered the penalty of imprisonment, therefore, defendant had his constitutional right to counsel.

Because we find that defendant's probation was properly revoked on the basis of his valid misdemeanor convictions, we do not reach his other claim of error.

Affirmed.

References for Points in Headnote

21 Am Jur 2D, Criminal Law §318.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution. 93 ALR2d 747.

[1] People v Brooks, 16 Mich App 759; 168 NW2d 658 (1969), apparently holds that a probationer is entitled to counsel at a misdemeanor trial at least in part because he may be imprisoned thereafter for probation violation. We note that the Brooks Court did not have the benefit of the explanation of Argersinger v Hamlin provided in Scott v Illinois. To the extent that Brooks is inconsistent with this opinion, we decline to follow it.

APPENDIX "B"

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 21st day of November in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,
THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 27-240
(27-240a)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 63671
COA: 77-1723
LC: 74-027-971-FA

JOHNNIE J. OLAH,
Defendant-Appellant.

On order of the Court, the delayed application for leave to appeal, the defendant-appellant's brief on appeal, and the responses to this Court's June 25, 1980, order to show cause are considered and, pursuant to GCR 1963, 865.1(7), we REVERSE the decision of the Court of Appeals and REMAND to the Wayne Circuit Court because the defendant's violation of probation was based in part upon two misdemeanor or ordinance convictions obtained when defendant Olah was not represented by counsel. A court may not enhance punishment at

sentencing because of a misdemeanor or ordinance conviction obtained when defendant was not represented by counsel. Baldasar v Illinois, ___ US ___; 100 S Ct 1585; 64 L Ed 2d 169 (1980). Violation of probation which results in a prison sentence is an increase as to an original sentencing decision which is precluded by Baldasar v Illinois, if counsel did not assist the defendant at the interim prosecutions. The case is remanded to the Wayne Circuit Court for further proceedings not inconsistent with this order.

We retain no jurisdiction.

Ryan, J., not participating.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

Seal

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 21st day of November in the year of our Lord one thousand nine hundred and eighty.

/s/ Corbin R. Davis, Deputy Clerk.

JAN 15 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-963

STATE OF MICHIGAN,

Petitioner,

vs.

JOHNNIE OLAH,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

PROOF OF SERVICE

AFFIDAVIT

STATE APPELLATE DEFENDER OFFICE
JAMES R. NEUHARD
Defender

ROLF E. BERG
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 80-963

STATE OF MICHIGAN,

Petitioner,

-vs-

JOHNNIE OLAH,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES JOHNNIE OLAH, RESPONDENT in the above captioned cause, by his attorneys, the State Appellate Defender Office, by Rolf E. Berg, and requests this Honorable Court to grant leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari to the Michigan Supreme Court (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 46.

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD
Defender

BY: _____
ROLF E. BERG
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Dated: January 13, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-963

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs

JOHNNIE OLAH,

Respondent.

AFFIDAVIT TO ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

I, Johnnie Olah, being first duly sworn according to law, depose and say in support of my motion for leave to proceed in forum pauperis, without being required to prepay costs or fees:

1. I am the Respondent in the above-captioned cause; I am a citizen of the United States of America.

2. Because of my poverty I am unable to pay the costs of defending myself in this cause in this Honorable Court; I am unable to give security for the same.

3. I further swear that the responses I have made to the question and instructions below relating to my ability to pay the cost of responding to the petition for writ of certiorari are true:

A. I am presently unemployed. I was last employed by the Manufacturuer's Export Company in 1972, before my trial. My average weekly take-home pay was $110.00.

B. I have not been employed since 1972; I have received no income in the past twelve months from any business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources. I live in my mother's house and have applied for general assistance welfare support payments. I am industrially blind in one eye.

C. I do not own any cash or checking or savings account.

D. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

4. I belive that I am entitled to the benefit of the judgment of the United States Supreme Court.

5. I have been found indigent for purposes of: (1) trial in the Wayne County Circuit Court and (2) appeals to the Michigan Court of Appeals and to the Michigan Supreme Court. On all appeals to date I have been represented by the State Appellate Defender Office, 1200 Sixth Avenue, Third Floor-North Tower, Detroit, Michigan 48226.

Further, I say not.

Johnnie Olah

Johnnie Olah

Subscribed and sworn to before me
this 13th day of January, 1981.

Katherine A. Foster

Notary Public, Wayne County, MI
My Commission Expires: 3/25/81

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-963

STATE OF MICHIGAN,

Petitioner,

vs

JOHNNIE OLAH,

Respondent.

_____/

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE
JAMES NEUHARD
Defender

ROLF E. BERG
Assistant Defender
1200 Sixth Street
Third Floor, North Tower
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

January 13, 1981

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. 80-963

STATE OF MICHIGAN,

Petitioner,

vs

JOHNNIE OLAH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Johnnie Olah respectfully requests this Honorable Court to deny the petition for writ of certiorari, seeking review of the order issued November 21, 1980, in the case of People v Olah, 409 Mich 948 (1980).

OPINIONS BELOW

Respondent accepts as correct the opinion and order contained in Petitioner's appendices "A" and "B".

COUNTERSTATEMENT OF QUESTIONS PRESENTED

DID THE TRIAL COURT VIOLATE THE CONSTITUTIONAL LIMITATION ON THE USE OF UNCOUNSELED MISDEMEANOR CONVICTIONS IN USING SUCH CONVICTIONS TO REVOKE APPELLANT'S PROBATION AND SENTENCE HIM TO PRISON?

COUNTER STATEMENT OF THE CASE

On February 24, 1975, Respondent was placed on two years probation by the Honorable James L. Ryan, then judge of the Wayne County Circuit Court, following his conviction by a jury on a charge of felonious assault. The conditions of this probation were, inter alia that he not violate any criminal law or ordinance.

On October 29, 1976, a petition was filed charging Respondent with violation of the terms of his probation. The petition alleged that Respondent had twice been convicted of misdemeanors while on probation. Respondent filed a sworn response in which he admitted the convictions. However, he alleged that the convictions had been obtained in violation of his rights to counsel, compulsory process and jury trial as guaranteed by the United States Constitution.

A probation revocation hearing was begun on November 19, 1976, and concluded on January 24, 1977, before Justice James L. Ryan's successor in the Wayne County Circuit Court, the Honorable William J. Giovan. At the hearing defense counsel repeated the claims in Respondent's reply to the bench warrant petition. He cited the case of People v Brooks, 16 Mich App 759, 168 NW2d 658 (1969), for the proposition that a sentence of probation may not be revoked on the basis of an uncounseled misdemeanor conviction.

The trial court found Respondent guilty of violating his probation on the basis of the certificates of conviction presented by the prosecution which were silent as to counsel. Respondent was sentenced to serve a prison term of 16 months to 4 years.

On appeal, the Michigan Court of Appeals affirmed Respondent's probation revocation in a published opinion. People v Olah, 90 Mich App 403; 282 NW2d 335 (1979) (Petitioner's Appendix "A"). The Court first noted that while these misdemeanor convictions had been gained without granting Respondent the assistance of counsel, they were valid under Scott v Illinois, 440 US 367; 99 S Ct 1158; 59 L Ed 2d 383 (1979), since only fines

had been imposed. The Court found no basis for limiting their subsequent use in the absence of a constitutional defect.

Secondly, the Court found that Appellant's imprisonment following the probation revocation did not alter this result as he was imprisoned on the prior felony conviction and not directly on the misdemeanor convictions.

The Michigan Supreme Court granted Respondent's application for leave to appeal People v Olah, 408 Mich 895 (1980). On June 25, 1980, that Court issued on its own motion a second order vacating its order granting leave to appeal and ordering that the prosecution show cause why the court should not reverse the Michigan Court of Appeals decision on the basis of this Court's decision in Baldasar v Illinois, ___ US ___ ; 100 S Ct 1585; 64 L Ed 2d 169 (1980); People v Olah, 409 Mich 855 (1980).

On November 21, 1980, the Michigan Supreme Court issued a final order holding that "Violation of probation which results in a prison sentence is an increase as to an original sentencing decision which is precluded by Baldasar v Illinois, if counsel did not assist the defendant at the interm prosecutions." People v Olah, 409 Mich 948 (1980)

Petitioner seeks a writ of certiorari to that court and Respondent now presents his brief in opposition.

SUMMARY OF ARGUMENT

In Baldasar v Illinois, ___ US ___; 100 S Ct 1585; 64 L Ed 2d 169 (1980), this Court held that an uncounseled misdemeanor conviction may not be used subsequently in a proceeding to authorize an additional sentence. In the present case the trial court would not have been authorized to revoke Respondent's probation and sentence him to prison but for the evidence presented of his uncounseled misdemeanor convictions.

Petitioner's argument that the factual issue of Respondent's criminal conduct was redetermined at the probation revocation proceeding with the assistance of counsel has two flaws. First, if true, the presentation of his uncounseled convictions as the

only evidence of criminal conduct violated Respondent's right to confrontation. Secondly, as a practical matter, such a procedure is absurd and contrary to Michigan criminal procedure.

The issue presented by Petitioner is based upon a contested interpretation of Michigan procedure which, even if true, has no demonstrated significance outside of Michigan. Petitioner has not presented an important issue of federal law which this Court should settle.

REASONS FOR DENYING THE WRIT

Petitioner begins his argument with the telling admission that he finds this Court's decision in Baldasar v Illinois, ___ US ___; 64 L Ed 2d 169; 100 S Ct 1585 (1980), confusing. Respondent believes this decision clearly establishes the principles relied upon by the Michigan Supreme Court in the present case.

Certainly the constitutional validity of a subsequent use of an uncounseled misdemeanor conviction is not to depend on whether the misdemeant had been sentenced to jail in violation of Scott v Illinois, 440 US 367 (1979). In Baldasar v Illinois, supra, the misdemeanor conviction underlying the habitual offender conviction was valid under Scott v Illinois, 440 US 367 (1979), in that no jail sentence was imposed. This Court rejected the argument that this validity permitted any subsequent use.

> "This logic is fallacious for the simple reason that petitioner's prior conviction was not valid for all purposes. Specifically, under the rule of Scott and Argersinger, it was invalid for the purpose of depriving petitioner of his liberty.
>
> * * *
>
> That petitioner has been deprived of his liberty 'as a result of [the first] criminal trial' could not be clearer. If it had not been for the prior conviction, petitioner could not have been sentenced to more than one year for the present offense." Baldasar v Illinois, ___ US ___; 100 S Ct 1585, 1587-1588; 64 L Ed2d 169, 174; 27 Cr L 3084, 3085 (Justice Marshall concurring.)*

* The per curiam opinion of the court stated only the facts and result and referred to the reasoning of the three concurring opinions. The concurring opinions by Justice Stewart was similar to the opinion of Justice Marshall. It held that Scott was violated since "petitioner ... was sentenced to an increased term only because he has been convicted in a previous prosecution in which he had not had the assistance

(Footnote concluded on following page).

Thus, the issue in the present case is whether Respondent's probation revocation was "as a result of" his misdemeanor convictions or alternatively, whether it was "only because he had been convicted in a previous prosecution." Certainly Respondent had a constitutionally protected interest in his conditional liberty as a probationer. Gagnon v Scarpelli, 411 US 778; 93 S Ct 1756; 36 L Ed 2d 656 (1973). But for proof of a violation of the terms of his probation — in this case proof of criminal conduct — the trial court was not authorized to resentence him to prison on the felonious assault charge. The only evidence of criminal conduct at Respondent's probation revocation hearing was the certificates of conviction.

Petitioner's principle argument in this court appears to be that the factual determination of Respondent's criminal conduct was redetermined with the assistance of counsel at the probation revocation hearing. He argues that the certificates of conviction were merely prima facie evidence which Respondent was free to refute with evidence of his innocence. Just how counsel could convince the trial court that the prior uncounseled determination of guilt was erroneous is unexplained by petitioner. The trial court is totally uninformed as to the prior evidence presented. Such a proceeding presents a bald denial of the right to confrontation Gagnon V Scarpelli, supra.

But beyond the absurdity or constitutional validity of such a proceeding is the fact that this does not accurately reflect Michigan criminal procedure. The Michigan Supreme Court has recognized a probation revocation sentence as a direct consequence of a later conviction. The Michigan Court Rules mandates notice of this consequence.

(Footnote continued from preceding page).

of appointed counsel in his defense." (Emphasis in original) Baldasar v Illinois, ___ US ___; 100 S Ct 1585, 1586; 64 L Ed2d 169, 173; 27 Cr L 3084, 3085 (1980)(Justice Stewart concurring).

The concurrence of Justice Blackman was based on his continuing disagreement with Scott. He would find the prior misdemeanor conviction invalid for any purpose.

"(1) An Understanding Plea. Speaking directly to the defendant, the court shall tell him:

* * *

(e) if he is on probation or parole, he may be sentenced for violating probation or parole;" GCR 1963, 785.7(1)(e).

Also, in People v Mallory, 378 Mich 538, 574 (1967) (Souris, J. concurring), the Court recognized that a defendant's misdemeanor conviction resulting in a probation revocation is the "effective cause" of his continued imprisonment. This holding was followed in People v Brooks, 16 Mich App 759, 761; 168 NW2d 658 (1969), where the court found that "the defendant's misdemeanor conviction subjected him to a felony penalty." Finally in vacating Respondent's probation revocation in the present case, the Michigan Supreme Court again implicitly rejected Petitioner's procedural interpretation.

In both Baldasar v Illinois, supra, and the present case, the defendant was represented by counsel at a hearing in which their factual guilt--previously determined without counsel--was at issue. In both cases the issue is the same: may the prosecutor present evidence of the prior uncounseled conviction. In Baldasar, supra, the Supreme Court determined that such use of an uncounseled conviction constitutes a denial of counsel if the second proceeding results in incarceration. The circumstances in the present case are indistinquishable in principle.

Petitioner has raised no federal issue which this Honorable Court should deem important to settle.

CONCLUSION

For all the foregoing reasons Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

JAMES R. NEUHARD (P18253)
Defender
1200 Sixth Street
Third Floor, North Tower
Detroit, Michigan 48226
(313) 256-2814

BY: _____

ROLF E. BERG (P26758)
Assistant Defender
1200 Sixth Street
Third Floor, North Tower
Detroit, Michigan 48226
(313) 256-2814

Dated: January 13, 1981

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-963

STATE OF MICHIGAN,

Petitioner,

vs

JOHNNIE OLAH,

Respondent.

STATEMENT AS TO MAILING

I, JAMES R. NEUHARD, Defender, of the State Appellate Defender Office hereby state, pursuant to Rule 28.2, that the following papers pertaining to the above captioned cause were deposited at the United States Post Office, General Post Office, 1401 Fort Street, Detroit, Michigan, on Tuesday, January 13, 1980, within the time for filing said papers, and that the same were properly addressed to the Clerk of the United States Supreme Court, and that first class postage was prepaid.

The papers so mailed were:

a) Motion to Proceed in Forma Pauperis
b) Brief in Opposition to Petition for Writ of Certiorari
c) Proof of Service
d) Affidavit

STATE APPELLATE DEFENDER OFFICE

BY: _____
JAMES R. NEUHARD
Defender

BY: _____
ROLF E. BERG
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

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vs

JOHNNIE OLAH,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

Dora Enloe being first duly sworn deposes and says that on January 13, 1981 she mailed the following documents:

Appearance Form
Motion for Leave to Proceed in Forma Pauperis
Respondent's Brief in Opposition
Statement of Mailing
Proof of Service and Affidavit

to: WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Counsel of Record
Principal Attorney, Appeals

BY: TIMOTHY A. BAUGHMAN
Assistant Prosecuting Attorney
1441 St. Antoine
Detroit, Michigan 48226

Further, deponent says not.

Dora Enloe
DORA ENLOE

Subscribed and sworn to before me
this 13th day of January, 1981.

Laurena Epplin
Notary Public, Wayne County, Michigan
My commission expires: 5/20/81